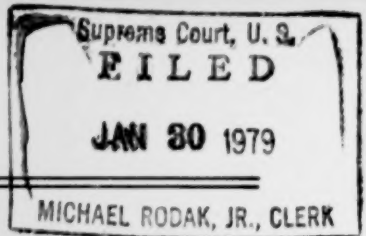


No. 78-968



IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

AKERS MOTOR LINES, INC., and
AKERS-CENTRAL MOTOR LINES, INC.,

Petitioner,

v.

DRIVERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS TEAMSTERS LOCAL UNION
NO. 71, a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR TEAMSTERS LOCAL UNION NO. 71
IN OPPOSITION

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BRIEF FOR TEAMSTERS LOCAL UNION NO. 71
IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-20) is reported at 582 F. 2d 1336. The Order of the District Court (Pet. App. 21-30) is not officially reported.

JURISDICTION

The opinion of the Court of Appeals is dated September 19, 1978, and was entered on that date. The Petition for a Writ of *Certiorari* was filed on December 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a federal district court has jurisdiction, pursuant to 29 U.S.C. § 185, to issue an injunction maintaining the status quo pending arbitration of contractual grievances where the District Court concludes that the Union's grievance is not frivolous and that without the injunction an arbitrator could not award meaningful relief.

STATUTE INVOLVED

The relevant provisions of the Labor Management Relations Act (29 U.S.C. §§ 173(d) and 185) and the Norris-LaGuardia Act (29 U.S.C. §§ 107 and 108) are set forth at Pet. 3-4.

STATEMENT

A. The District Court's Findings of Fact

Akers Motor Lines and Akers-Central Motor Lines (hereafter collectively "the Company") are joint employers operating as common carriers in the trucking industry, pursuant to authority granted by the Interstate Commerce Commission. The Company operated a series of terminals, from which local drivers disperse to pick up or deliver freight. Terminal employees load, unload and sort freight. Road drivers transport freight between terminals. Also at the various terminals are the office staff, automotive mechanics and building maintenance employees needed to operate the vast system.

Teamsters Local Union No. 71 (hereafter, "the Union") represents Company employees at the Charlotte, North Carolina and Florence, South Carolina terminals. For many years, the Company and the Union were parties to collective bargaining agreements known as the National Master Freight Agreement

(including the Carolina Freight Council Over-the-Road, City Cartage, and Automotive Maintenance Supplemental Agreements), the Carolina Area Office Clerical Agreement and the Building Maintenance Agreement. Each of these collective bargaining agreements contains a no-strike, no-lockout clause and a mandatory grievance provision (Pet. App. 3, 22).

In 1974, the Union represented approximately 1,200 employees covered by labor agreements, including all the road drivers in the Company's system. Later in 1974, the Company abandoned its sleeper (two-man) operation and established a relay operation with drivers based in Charlotte and in Northeast, Maryland. The Company obtained a change of operations decision from the appropriate grievance committee and afforded Charlotte drivers the opportunity, by seniority, to move to the new Maryland domicile.

At the end of 1975, the Company began a Special Commodities Operation (Pet. App. 22-23; A. 541, 546).¹ The parties had recognized that the high wages in the Road Supplement do not permit employers to haul profitably many low-rated commodities such as certain steel and refrigerated products, collectively known as special commodities. Accordingly, the Road Supplement contains a reference to the Steel Rider, Article 63, which permits the hauling of special commodities under different conditions than the employer's general commodities operation covered by the Road and City Supplements (A. 56). Nevertheless, the parties further recognized that the Steel Rider could not be used to undermine the conditions set forth in the general commodities contracts (A. 97).²

1. "A." references are to the appendix to the briefs below; a copy has been lodged with this Court.
2. The Steel Rider "is entered into on the representation of the Employer that operations under this Rider will not interfere with or cause loss of employment or employment opportunity to employees of the Employer who are covered under the National ... Agreement and the ... Supplements thereto. The Employers, therefore, as a condition to entering into this Rider, agree that operations under this Rider will not in any way be utilized or directed to adversely affect, directly or indirectly, or have the effect of interfering with employment and employment opportunities of any employees working under the National ... Agreement and the ... Supplements thereto." (A. 97).

At first, the Company utilized flatbed equipment and refrigerated vans to haul steel and refrigerated commodities. The Union and the Company entered into negotiations in accordance with Article 63 of the Road Supplement, ultimately reaching agreement on a Steel and Special Commodities Rider limited to steel and refrigerated commodities which could be hauled on flatbed or refrigerated equipment (A. 541-543, 550-551). Subsequently, the Company fired its negotiator and Company President Victor DeMaras personally resumed negotiations and reneged on the agreement. No new agreement was reached, but DeMaras made a commitment that he would not use van-type trailers in its Special Commodities Division, since this equipment could promote a subterfuge to haul general commodities and avoid compliance with the Road, City and Maintenance Supplements (A. 550-551). Sometime in 1976, the Union discovered that the Company was using a van in the Special Commodities Division. The Union complained to DeMaras, who insisted that it was a mistake and would not happen again (A. 551-552, 556-557).

In September, 1977, an accident to a special commodities tractor-trailer revealed that the Company was indeed hauling general commodities in its special commodities operation. The work revealed by the accident had previously been performed by road drivers represented by the Union. Company and Union officials met to discuss the matter, which the Company claimed was a single, isolated incident. The Union filed a grievance alleging an unlawful pattern of conduct which drastically affected the road drivers it represented³ (Pet. App. 23; A. 548-549, 555-556, 615-616).

By late 1977, the Company had closed several terminals and laid off large numbers of employees. The Union then represented but 200 employees at the Company (Pet. App. 22). By February, 1978, the Company had closed its remaining

3. In its brief the Company argues that the Union had knowledge of the Company's Special Commodities Operation for a period of at least two years (Pet. 5-7, 10, 16). This contention is misleading; the Court of Appeals noted that the September grievance was "prompted by the discovery that a special commodities trailer was hauling general commodities (Pet. App. 5).

terminals and laid off all remaining Union employees, except for two in Charlotte, and all other Union employees throughout its general commodities system (Pet. App. 22; A. 218, 277). The Company has expanded its Special Commodities Division to haul any commodity on a truckload basis directly between shipper and consignee, thereby eliminating the need for terminals. Much of this work had been done by employees represented by the Union. By February, 1978, the Company had 166 special commodities drivers, of whom no more than 12 were covered by any labor agreements (Pet. App. 23-24; A. 278). By March, the Special Commodities Division was grossing in excess of \$1 million a month (Pet. App. 25; A. 111).

In February, 1978, the Union filed a second grievance alleging that the Company was operating its Special Commodities Division in violation of the collective bargaining agreements. On March 1, 1978, the Union filed five grievances alleging that the Company had unlawfully withheld vacation pay due the laid off employees (Pet. App. 23; A. 78-86).

While the Union was processing these grievances through the three-stage grievance procedure, the Company utilized every procedural delay permitted by the contracts (Pet. App. 23). While delaying resolution of the Union's grievances, the Company simultaneously began liquidating its assets. It has sold almost all its tractors and trailers and is selling or has sold or leased its terminals. It is also selling some of its valuable ICC rights (Pet. App. 25-26; A. 325-330, 683-684, 751). Almost all of the Company's assets, including all of its substantial assets, are at least partially secured by a group of banks, which has already insisted upon a moratorium in the Company's payment of debts owed to the Pension Fund (Pet. App. 26). Despite this apparent liquidation, the Company continues to hire additional drivers and expand its trucking business (A. 231). The Company's shuffling of assets is aided by the existence of Akers Motor Lines of Delaware and Transport Investment Corporation; both of these companies are owned or controlled by Mr. DeMaras.

Faced with the concurrent delays in the grievance system and the liquidation of the Company, the Union sought a preliminary injunction on March 10, 1978 to prevent the further

dismemberment of the Company pending resolution of its grievances.

B. The District Court's Order

Based on the foregoing facts, the District Court found that there "is substantial evidence that Akers-Central is operating in violation of the collective bargaining agreements and Local 71 has demonstrated a reasonable likelihood of success in its grievances" (Pet. App. 24). The Court concluded that "Local 71 and its members are entitled to an injunction to preserve the status quo and to prevent a dissipation of assets pending a final resolution of all pending grievances" (Pet. App. 27). This conclusion was based upon the supporting conclusions that the Union and its members would be irreparably injured unless the status quo could be preserved and the Union would suffer more if the injunction were denied than would the Company if the injunction were issued. (Pet. App. 26-27).

The injunction forbids the Company from directly or indirectly selling, disposing of, or in any manner encumbering its capital assets (Pet. App. 28). "The basic purpose of this order is to prevent further liquidation and dissipation of assets of defendants, but to allow normal operation of the trucking business." (Pet. App. 29). The court specifically permitted the Company to petition the Court for modifications of its Order (Pet. App. 27).

C. The Decision of the Court of Appeals

In an unanimous decision, the Court of Appeals affirmed the District Court's decision. Although concluding that the District Court had held too extensive an evidentiary hearing, the Court of Appeals held that the injunction had properly issued. The Court stated (Pet. App. 12-13):

If Akers-Central is allowed to continue its process of liquidation and disposition of assets, any victory by the union at the arbitration table may be meaningless. If the remaining terminals and vehicles are sold, there will be no jobs for re-assignment to Local 71 employees.

If assets from ongoing operations are encumbered, there will be no fund from which to pay vacation monies. "[T]he arbitral award when rendered could not return the parties substantially to the *status quo ante*." *Id.* Therefore, we hold that the grant of injunctive relief in this case was proper.

The Court of Appeals upheld the discretion of the District Court which refused to restore the status quo by ordering the rehiring of the laid off union employees (Pet. App. 17).

D. Subsequent Developments

Following the issuance of the injunction, the Company temporarily abandoned its policy of delaying the processing of grievances. The Eastern Conference Joint Area Committee sustained the Union's position on the vacation pay grievance. When the Company refused to comply with the Committee award, the District Court issued a judgment in the Union's favor in the amount of \$310,000 (Supp. App. 14).⁴ The Eastern Conference Joint Area Committee had deadlocked the special commodities grievances on a procedural issue and the grievances are now awaiting resolution by the National Greivance Committee.

ARGUMENT

The decision of the Court of Appeals involves a correct application of settled principles to the facts of this particular case and is not in conflict with that of any other Court of Appeals. There is thus no occasion for review by this Court.

1. No court has rejected the legal principle applied to this case:

An injunction to preserve the status quo pending arbitration may be issued either against a company or

4. "Supp. App." references to the Supplemental Appendix attached to this Brief.

against a union in an appropriate *Boys Markets* case where it is necessary to prevent conduct by the party enjoined from rendering the arbitration process a hollow formality in those instances where, as here, the arbitral award when rendered could not return the parties substantially to the *status quo ante*.

(Pet. App. 11), quoting *Lever Bros. Co. v. Int'l Chemical Workers Union, Local 217*, 554 F. 2d 115, 123 (4th Cir. 1976). In *Hoh v. Pepsico, Inc.*, 491 F. 2d 556, 560-561 (2d Cir. 1974), the court suggested that an injunction pending arbitration would be appropriate where "the other criteria governing the issuance of injunctions were met."⁵ Conversely, an injunction pending arbitration should be denied where "arbitration of the dispute will be unaffected by [the employer's] alteration of the status quo [and] the situation can be restored substantially to the status quo ante." *Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc. [Greyhound II]*, 550 F. 2d 1237, 1239 (9th Cir. 1977), cert. denied, 434 U. S. 837.

Thus, the issue in each case is ultimately one of fact: can the arbitrator restore the *status quo ante* if the employer is permitted to make contemplated changes during the arbitration process. Courts have granted such injunctions to forestall plant removal,⁶ to prevent the continuation of an imminent safety threat,⁷ to prevent the termination of health insurance benefits,⁸ and to prevent the discontinuance of a

5. Acting on this rationale, district courts have issued such injunctions in appropriate factual situations. *Bakery Drivers Union v. S. B. Thomas, Inc.*, ____ F. Supp. ____, 99 L.R.R.M. 2253, 2256-2258 (E. D. N. Y. 1978); *Koster Bakeries, Inc. v. Teamsters, Local 802*, ____ F. Supp. ____, 97 L.R.R.M. 2806, 2808 (E.D.N.Y. 1977).

6. *Lever Bros., supra*; *Texaco Independent Union v. Texaco, Inc.*, 452 F. Supp. 1097, 1105 (W. D. Pa. 1978).

7. *Steelworkers v. Blaw-Knox Foundry and Mill Machinery, Inc.*, 319 F. Supp. 636, 641 (W. D. Pa. 1970).

8. *Steelworkers v. Fort Pitt Steel Casting*, ____ F. Supp. ____, 98 L.R.R.M. 3072, 3073-3074 (W. D. Pa. 1978).

portion of a business.⁹ In each case, the Court concluded that an arbitrator could not remedy the contract violation with a monetary award and that restoration of the *status quo ante* would be otherwise impossible. Here the District Court and the Court of Appeals both concluded that the Union has filed arbitrable grievances, that the Company is liquidating its business and that an arbitration award could not restore the *status quo ante* if liquidation continued during the arbitration process (Pet. App. 12-13, 26-27). Of course, this Court has denied *certiorari* where review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved, or upon the construction of a particular contract. *United States v. Johnston*, 268 U. S. 220, 227 (1925).

2. The legal principles applied are fully consistent with the national labor policy favoring resolution of contractual disputes through arbitration. In *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U. S. 235, 253-254 (1970), the Court held that §301 authorized district courts to enjoin strikes in breach of contract where the parties were obligated to arbitrate the underlying dispute and an injunction was supported by normal equity considerations. The decision was intended to provide a mechanism for enforcing a union's agreement to arbitrate certain grievances; the injunction would compel the union to arbitrate rather than resort to economic force. When lower courts transformed *Boys Markets'* pro-arbitration rationale into an anti-strike weapon, the Court held that §301 did not provide jurisdiction to enjoin sympathy strikes, in which the arbitrable dispute, the scope of the no-strike clause, was not the cause of the strike. *Buffalo Forge Co. v. Steelworkers*, 428 U. S. 397, 407 (1976). In reaching this decision, the Court stated:

The driving force behind *Boys Markets* was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties.... Striking over an arbitrable dispute would interfere with and frustrate the arbitral process by which the parties had chosen to settle a dispute.

9. *Bakery Drivers Union, supra*; *Furriers Joint Council v. Ben Wirtzbaum Furs, Inc.*, ____ F. Supp. ____, 100 L.R.R.M. 2117, 2119 (S. D. N. Y. 1978), citing *Akers Motor Lines* with approval.

Ibid. The central premise in both decisions is that courts may issue injunctions to preserve an arbitrator's jurisdiction, but may not themselves invade the arbitrator's jurisdiction by resolving the merits of the dispute.

Within this jurisdictional framework, it is clear, the instant dispute presents the mirror image of *Boys Markets*, and the *Buffalo Forge* decision supports the issuance of an injunction. In *Boys Markets*, the injunction preserved the arbitrator's jurisdiction to hear the dispute by compelling the union to arbitrate rather than strike. Here, the injunction preserved the arbitrator's jurisdiction to award a meaningful remedy by compelling the employer to retain its assets in order to resume its operations or to pay monetary damages. In both situations, the injunction fostered the arbitration process.

Boys Markets requires certain factual, substantive prerequisites for the issuance of an injunction: there must be an arbitrable dispute over an alleged breach of contract which the parties are obligated to arbitrate; and the breach must cause irreparable injury to the employer, who would suffer more from the denial of an injunction than would the union from its issuance. *Boys Markets, supra*, 398 U. S. at 253-254. In a *Boys Markets* situation, the strike over an arguably arbitrable grievance is presumptively unlawful, the court need not consider the merits of the grievance, and the equitable considerations weigh most heavily in favor of the employer.

No court has interpreted *Buffalo Forge* to preclude an injunction against an employer to preserve an arbitrator's jurisdiction, but that result flows directly from the Company's position.¹⁰ When a union seeks an injunction, the facts become crucial in resolving the equitable issues. Not all grievances re-

10. The Company's position would force a union to strike in breach of contract, thereby violating national labor policy. Then, when the employer seeks a *Boys Markets* injunction, the union would ask the court to restore the *status quo ante* as part of the injunction. Cf. *Gateway Coal Co. v. Mine Workers*, 414 U. S. 368, 387 (1974). This tactic is futile where, as here, the employer has laid off every employee and a strike is impossible.

quire equitable relief. Thus, the grievance must be "sufficiently sound to prevent the arbitration from being a futile endeavor." (Pet. App. 15).¹¹ Furthermore, the court must determine that the union is suffering irreparable injury and will suffer more from the denial of the injunction than will the employer from its issuance. Of necessity, this requires more factual analysis than the simple *Boys Markets* situation. Thus, the court below correctly concluded that a district court has jurisdiction to hold hearings and make findings of fact as a concomitant to issuing injunctive relief.

3. The Company's "equitable" arguments reveal a thorough misreading of the record. There is no record evidence that the injunction has inflicted any injury upon the Company, and the order explicitly permits the Company to seek court approval of specific sales of assets (Pet. App. 19, 27). Naturally, the order will expire upon completion of the arbitration process and compliance with any resulting awards. It is significant that the Company opposed, successfully, expediting this process. While the record reveals that many of the Company's assets are pledged as security, the record does not show that the security equals the current market value. The order, therefore, prohibits further encumbering certain assets and newly encumbering the remaining assets. For example, unpledged assets could be used to secure the currently unsecured debt of \$1 million allegedly due Company President DeMaras. Because Local 71 had a reasonable chance to obtain an arbitration award for at least \$200,000 in vacation pay (Pet. App. 25) and a far larger amount in the special commodities grievances, the courts reasonably concluded that an arbitration victory would be a sham unless the Company had unencumbered operating assets from which to pay the awards and to resume operations (Pet. App. 13, 25-27). In sum, the courts' resolution of the equitable considerations is well within the bounds of discretion.¹²

11. In *Hoh v. Pepsico, supra*, the Second Circuit required a more thorough analysis: the union must show "some likelihood of ultimate success" in the ensuing arbitration. 492 F. 2d at 561.

12. The District Court's Order enforcing an arbitration award against Akers-Central in the amount of \$310,000 still has not been satisfied.

The Company's "clean hands" argument is meretricious. The record reveals that Local 71 made every effort short of litigation to resolve this dispute. As a condition for the payment of vacation money, the Company and its banks insisted upon a moratorium in the repayment of \$400,000 due the Central States, Southeast and Southwest Pension Fund (Pet. App. 25-26). Although the Union had known that the Company had created a Special Commodities Division, the Union filed grievances beginning in September, 1978, immediately upon learning that this new Division was subverting the contractual general commodities operation by hauling any and all commodities by non-union drivers in total disregard of the collective bargaining agreement (Pet. App. 5; A. 548-549, 555-556, 615-616). Surely, requiring the Union to make "every reasonable effort", 29 U.S.C. § 108, to resolve a dispute by arbitration does not compel the Union to waive valid claims when the Company simply abandons its contracts and gets rid of its unionized employees, many of whom have 20 and 30 years seniority.

Similarly without merit is the Company's attack on Local 71's "clean hands" because the International Union filed a Complaint with the Interstate Commerce Commission. That suit seeks to force the Company to comply with its operating authority by accepting less-than-truckload freight. If the ICC sustains the International Union's complaint, the Company will be directed to resume its general commodities operation or cease doing business. Both suits seek to compel compliance with national labor policy and national transportation policy. If the cost of noncompliance is the dissolution of the Company's trucking business, the ultimate choice is not the Union's. In any event, the litigation in no way demonstrates bad faith and the courts quite reasonably rejected the argument.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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January, 1979

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-78-0087

DRIVERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS TEAMSTERS LOCAL UNION
NO. 71, a/w INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

Plaintiff,

vs.

AKERS MOTOR LINES, INC. and
CENTRAL MOTOR LINES, INC.,

Defendants.

PARTIAL SUMMARY JUDGMENT

THIS CAUSE COMING ON TO BE HEARD upon the plaintiff's Motion for Partial Summary Judgment filed herein June 5, 1978; and the Court having examined the said Motion, responses thereto and Affidavits, and having considered the arguments of counsel, and having concluded that there is no substantial controversy as to the material facts, which are as follows:

1. On March 1, 1978, Conrad Sides, Vice President of the plaintiff, filed grievances against the defendants on behalf of the road, city and maintenance employees of the de-

fendants, covered by the National Master Freight Agreement, requesting that they receive vacation pay from the defendants.

2. On June 1, 1978, these grievances were heard and decided by the Eastern Conference Joint Area Committee; the plaintiff's claims were upheld and a decision was rendered thereon, as set forth in those Affidavits of Conrad Sides and Delores Craycraft, filed herein June 5, 1978 and December 6, 1978, respectively.

3. The total amount of vacation pay awarded under the said decision in behalf of these said road, city and maintenance employees covered by the National Master Freight Agreement, as shown on the "gross pay" column of the payroll registry attached to said Affidavits of Conrad Sides and Delores Craycraft, amounted to the sum of \$310,648.06, as of the date of that decision, June 1, 1978.

4. No payments have been made to reduce the amount of this indebtedness; nor have any offsets been claimed by the defendants.

UPON THE FOREGOING FINDINGS, the Court concludes that the plaintiff is entitled to receive Partial Summary Judgment of the defendants in the sum of \$310,648.06, together with interest thereon at the legal rate of 6% per annum from and after June 1, 1978, until paid;

NOW, THEREFORE, UPON THE FOREGOING FINDINGS AND CONCLUSIONS, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff have and recovery Judgment of the defendants, Akers Motor Lines, Inc. and Central Motor Lines, Inc., in the sum of \$310,648.06, together with interest thereon at the legal rate of 6% per annum from June 1, 1978, until paid, and the costs of this action.

This the 14 day of December, 1978.

/s/ James B. McMillan
United States District Judge

FILED
Charlotte, N. C.
Dec 15 1978
U. S. District Court
W. Dist. of N. C.